No. 15530

United States Court of Appeals

for the Ninth Circuit

JOHN CAVANAUGH, Appellant,

vs.

CHARLES J. LONG Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Nevada

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-22-57

No. 15530

United States
Court of Appeals
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JOHN CAVANAUGH, Appellant,

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B. E. McKENZIE, Appellee.

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Appeal from the United States District Court for the District of Nevada

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

GRUBIC, DRENDEL & BRADLEY,

Attorneys at Law,

304 Medico-Dental Building,
130 North Virginia Street, Reno, Nevada,

For the Appellant.

FRANKLIN RITTENHOUSE, ESQ.,

United States Attorney,

Post Office Building, Reno, Nevada,

For the Appellee. [1]*

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* Page numbers appearing at bottom of page of Original Transcript of Record.

In the United States District Court
for the District of Nevada

No. 1293 Civil

JOHN CAVANAUGH, Plaintiff,

vs.

B. E. McKENZIE, Defendant.

PETITION

The petition of B. E. McKenzie, defendant in the above-entitled action, for removal to the United States District Court of the above-entitled action now pending in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, pursuant to Section 1442(a), Title 28, United States Code, shows:

1.

That on January 24, 1957, the above-entitled action was commenced in the said Second Judicial District Court of the State of Nevada, in and for the County of Washoe, by filing of the complaint, a copy of which is hereto attached, and the issuance of a summons thereon, and is now pending in said Court.

2.

That the nature of said action is as follows:

Complaint for injunction enjoining B. E. McKenzie, Commanding Officer, Stead Air Force Base, Washoe County, Nevada, and his successors in interest, from interfering with, diminishing, or impairing plaintiff's right of ingress to and egress

from his property, described as Township 20 North, Range 19 East, [2] M. D. B. & M., Section 5: E½; E½ of W½, excepting therefrom the south 200 feet thereof.

3.

Petitioner was at all times mentioned in said action, and now is, a duly appointed commissioned officer of the United States Airforce, and at all times mentioned in the complaint in said action was acting under right, title and authority vested in him, and in the discharge and performance of his official duties under and by virtue of the laws of the United States of America and regulations pertaining to the administration of the United States Air Force.

4.

That there has not as yet been any trial or final hearing of said action.

Wherefore, petitioner prays that said action may be removed from the said State Court into this Court for trial and determination as provided in Section 1442(a), Title 28, United States Code, and thereupon proceeded as a cause originally commenced therein.

Dated this 30th day January, 1957.

FRANKLIN RITTENHOUSE,
United States Attorney,
By /s/ HERBERT F. AHLSWEDE,
Assistant U. S. Attorney,
Attorneys for Defendant. [3]

Duly Verified.

[Endorsed]: Filed January 30, 1957.

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe

No. 166187, Dept. No. 2

JOHN CAVANAUGH, Plaintiff,

vs.

B. E. McKENZIE, Defendant.

COMPLAINT FOR INJUNCTION

Plaintiff complains of defendant and for cause of action alleges:

I.

At all times herein mentioned, plaintiff was, and now is, a resident of Reno, Washoe County, Nevada.

II.

At all times herein mentioned, plaintiff was, and now is, the owner of the following described real property situate, lying and being in Washoe County, Nevada:

> T. 20 N., R. 19 E., M. D. B. & M. Sec. 5: E½; E½ of W½, excepting therefrom the south 200 feet thereof.

III.

At all times herein mentioned, defendant was, and now is, the Commanding Officer at Stead Air Force Base, Reno, Washoe County, Nevada.

IV.

That on or about the 1st day of August, 1956, defendant unlawfully caused an obstruction, namely,

a padlocked gate, to be placed across the dirt road at the point [4] designated "Present Gate" on the map attached hereto and incorporated herein by reference thereto, and defendant, unlawfully, forcibly restrained plaintiff from using said road to gain access to his property via the old Purdy Highway designated as "Old Purdy Highway" on the map attached hereto; that plaintiff and the general public have enjoyed unobstructed use of this road in this area for many years in lieu of the access heretofore enjoyed by plaintiff to his property via the old Purdy Highway which is now obstructed by a fence maintained by defendant.

V.

That said action on the part of defendant was beyond any authority conferred upon him as Commanding Officer of Stead Airforce Base, Reno, Washoe County, Nevada, in that no authority whatsoever has been vested in the defendant by statute, or otherwise, to obstruct roads or other existing rights of way in the vicinity of Stead Airforce Base, Reno, Washoe County, Nevada, upon property held by the United States Government "subject to any and all easements and rights of way in, upon or across said land."

VI.

That defendant is an abutting property owner on the old Purdy Highway as indicated on the map attached hereto and that if the defendant is not enjoined from obstructing plaintiff's access to his

property via the old Purdy Highway, plaintiff will suffer great and irreparable damage and injury in that he will be deprived of the use of his property without due process of law. That defendant is currently obstructing plaintiff's access to his property via the old Purdy Highway and is now depriving plaintiff of the use of his property without due process of law. [5]

VII.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays:

1. That a temporary restraining order issue out of this Court enjoining the defendant from obstructing plaintiff's access to his property via the old Purdy Highway.

2. That an order to show cause be issued by this Honorable Court ordering and commanding said defendant to be and appear before said Court at a time and place to be fixed in said order and then and there to show cause why he should not be enjoined and restrained from interfering with, diminishing or impairing plaintiff's right of access to and from his property above described.

3. That upon the final hearing of this cause, the defendant and his successors in interest be perpetually enjoined from interfering with, diminishing or impairing plaintiff's right of ingress to and egress from his property above described via the old Purdy Highway.

4. For such other and further relief as to this Court may seem just in the premises.

GRUBIC, DRENDEL & BRADLEY,
By WILLIAM O. BRADLEY,
Attorneys for Plaintiff. [6]

Duly Verified.

[Endorsed]: Filed January 24, 1957.

[Title of District Court and Cause.]

SUMMONS

The State of Nevada sends greetings to the above-named defendant:

You are hereby summoned and required to serve upon Grubic, Drendel & Bradley, plaintiff's attorney, whose address is 304 Medico-Dental Bldg., 130 N. Virginia St., Reno, Nevada, an answer to the Complaint which is herewith served upon you, within 20 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.*

[Seal] H. K. BROWN,
Clerk of Court,
By /s/ D. CAIN,
Deputy Clerk.

Date: January 24, 1957.

Received January 29, 1957.

*Note.—When service is by publication, insert a brief statement of the object of the action. See Rule 4. [7]

[Title of Second Judicial District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon the verified complaint of John Cavanaugh attached hereto, it is

Ordered, that the defendant, B. E. McKenzie, show cause before this court on Friday, February 1, 1957, at 3:00 o'clock p.m., or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein enjoining the defendant, B. E. McKenzie, his agents, servants, employees and attorneys and all persons in active concert and participation with him, pending the final hearing and determination of this action from obstructing the access of plaintiff, his agents, servants, employees and successors in interest, to and from his property via the old Purdy Highway, and

It appearing to the court that defendant is committing the acts hereinafter specified and that he will continue to do so unless restrained by order of this court, and that immediate and irreparable injury, loss and damage will result to plaintiff before notice can be served and a hearing had on plaintiff's motion for a preliminary injunction, in that [8] plaintiff is being and will continue to be deprived of the use of his property without due process of law, and plaintiff having given security approved by the court in the sum of $500 for the payment of such costs and damages as may be incurred or suffered by any party who is found to

have been wrongfully enjoined or restrained; it is further

Ordered, that defendant, B. E. McKenzie, his agents, servants, employees and attorneys and all persons in active concert and participation with him be and they hereby are restrained from obstructing access of plaintiff, his agents, servants, employees and successors in interest to and from his property via the old Purdy Highway, and it is further

Ordered, that this order expires within 10 days after entry unless within such time the order for good cause shown is extended for a like period, or unless the defendant consents that it may be extended for a longer period; and it is further

Ordered, that service of this order to show cause, together with a copy of the papers hereto attached, on defendant B. E. McKenzie on or before Saturday, January 26, 1957, at 12 m. o'clock be deemed sufficient service.

Dated: January 24th, 1957.

/s/ A. J. MAESTRETTI,
District Judge. [9]

[Endorsed]: Filed January 24, 1957.

[Title of Second Judicial District Court and Cause.]

BOND FOR TEMPORARY RESTRAINING ORDER

Whereas the above-named plaintiff has commenced an action and issued Summons therein in the Second Judicial District Court of the State of

Nevada in and for the County of Washoe, against the above-named defendant, and is about to apply for an order to show cause and a restraining order in said action against said defendant, enjoining and restraining him, his agents, servants, employees and attorneys from the commission of certain acts as in said complaint filed in said action are more particularly set forth and described;

Now, therefore, the Hartford Accident and Indemnity Company, a Connecticut corporation authorized to transact a surety business in the State of Nevada, in consideration of the premises and of the issuance of said restraining order, does undertake in the sum of $500, and promise to the effect that in case said restraining order is issued, the said plaintiff will pay to the said parties enjoined such damages, not exceeding the said sum of $500, as such defendant may sustain or incur, by reason of said restraining order, if the said court finally decide that the plaintiff was not [10] entitled thereto.

Dated this 24th day of January, 1957.

HARTFORD ACCIDENT &
INDEMNITY CO.,
By /s/ J. E. SLINGERLAND,
Attorney in Fact.

The above bond approved this 24th day of January, 1957.

/s/ A. J. MAESTRETTI,
District Judge. [11]

[Endorsed]: Filed January 24, 1957.

[Title of District Court and Cause.]

MOTION

B. E. McKenzie, defendant above-named, through his attorney, Franklin Rittenhouse, United States Attorney, by Herbert F. Ahlswede, Assistant United States Attorney, respectfully moves the Court that the temporary restraining order issued herein by the Second Judicial District Court of the State of Nevada be dissolved and vacated, for the following reasons:

1. The temporary restraining order was granted without notice to the adverse party and did not comply with Rule 65(b), Nevada Rules of Civil Procedure, in that the immediate and irreparable loss, injury or damage was not shown by specific facts in the affidavit or verified complaint.

2. The temporary restraining order did not comply with Rule 65(b), Nevada Rules of Civil Procedure, in that it did not define the injury and state why it was irreparable.

Dated January 30, 1957.

FRANKLIN RITTENHOUSE,
United States Attorney,
By /s/ HERBERT F. AHLSWEDE,

Assistant United States Attorney, Attorney for Defendant. [12]

[Endorsed]: Filed January 30, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

I.

At all times mentioned herein, plaintiff was, and now is, a resident of Reno, Washoe County, Nevada.

II.

At all times mentioned herein, plaintiff was, and now is, the owner of the following described real property situate, lying and being in Washoe County, Nevada:

> Township 20 North, Range 19 East, M. D. B. & M. Sec. 5: E½; E½ of W½, excepting therefrom the south 200 feet thereof.

III.

At all times mentioned herein, defendant was, and now is, the Commanding Officer at Stead Airforce Base, Washoe County, Nevada.

IV.

That on or about the 1st day of August, 1956, defendant unlawfully [13] caused an obstruction, namely a padlocked gate, to be placed across the dirt road at the point designated "Present Gate" on the map attached hereto and incorporated herein by reference thereto, and defendant unlawfully forcibly restrained plaintiff from using said road to gain access to his property above described; that plaintiff, his predecessors in interest, and the gen-

eral public have enjoyed unobstructed use of this road in this area for many years in lieu of the access heretofore enjoyed by plaintiff to his property via the Old Purdy Highway which is now unlawfully obstructed by a fence maintained by the defendant; that plaintiff has no other convenient means of ingress to and egress from his property aforesaid, save and except over the road through the now padlocked gate or via the Old Purdy Highway which is now obstructed by the fence maintained by defendant; that defendant threatens to continue to maintain the padlocked gate aforesaid and to maintain the fence across the Old Purdy Highway, thereby permanently and irreparably diminishing the value of plaintiff's property above described.

V.

That plaintiff's property above described abuts on the Old Purdy Highway as indicated on the map attached hereto and that if the defendant is not enjoined from obstructing plaintiff's ingress to and egress from his property, plaintiff will suffer great and irreparable injury in the following respects:

1. Plaintiff has two buildings under construction on said property, and he has construction crews and building materials standing by to complete said buildings; that plaintiff now has opportunities to rent said buildings when finished, but he is unable to finish said buildings because defendant has unlawfully obstructed his access as above described.

2. Plaintiff has contracted for the removal of other buildings which [14] he must immediately and

forthwith remove from their present sites or lose them; that the only property to which plaintiff can move the buildings is the property now barricaded by defendant, as above described; that said buildings can not be replaced.

3. The value of his property will be immediately and irreparably destroyed if plaintiff is wrongfully deprived by defendant of his right of ingress and egress to and from said property, as above described.

VI.

That said action on the part of defendant was and is beyond any authority conferred upon him as Commanding Officer of Stead Airforce Base, Washoe County, Nevada, in that no authority whatsoever has been vested in the defendant by statute, or otherwise, to obstruct roads or other existing rights of way in the vicinity of Stead Airforce Base, Washoe County, Nevada, upon property held by the United States Government "subject to any and all easements and rights of way in, upon or across said land."

VII.

That plaintiff has no plain, speedy or adequate remedy at law in that the unlawful actions on the part of the defendant in barricading plaintiff's property has been continuous for some time in the past and the defendant threatens to continue to maintain the barricades in the future.

VIII.

That the damage herein complained of will be done before notice can be served on defendant and

a hearing had on plaintiff's motion for a preliminary injunction.

Wherefore, plaintiff prays:

1. That a temporary restraining order issue out of this Court enjoining the defendant from obstructing plaintiff's access to his property through the gate designated "Present Gate" as well as via the Old Purdy Highway, both [15] situate in the SE¼ of SW¼ of Section5, Township 20 North, Range 19 East, M. D. B. & M.

2. That an order to show cause be issued by this Honorable Court ordering and commanding said defendant to be and appear before said Court at a time and place to be fixed in said order and then and there to show cause why he should not be enjoined and restrained from interfering with, diminishing or impairing plaintiff's right of access to and from his property above described through the gate designated "Present Gate" on the map attached hereto, as well as via the Old Purdy Highway as indicated on the map attached hereto, pending a final determination of this action.

3. That upon the final hearing of this cause, the defendant and his successors in interest be perpetually enjoined from interfering with, diminishing or impairing pliantiff's right of ingress to and egress from his property above described through the gate designated "Present Gate" on the map attached hereto, as well as via the Old Purdy Highway as indicated on the map attached hereto.

4. For costs of suit and such other and further relief as to this Court may seem just in the premises.

GRUBIC, DRENDEL & BRADLEY,
By /s/ WILLIAM O. BRADLEY,
Attorneys for Plaintiff. [16]

Duly Verified.

[Endorsed]: Filed February 4, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, B. E. McKenzie, by Franklin Rittenhouse, United States Attorney, and moves the Court to dismiss the above entitled action on the ground that the Court is without jurisdiction to entertain this action because it is in substance and effect against the United States of America, which has not consented to be sued or waived its immunity from suit. This Motion is based upon the pleadings, records, and testimony in the above entitled action.

Dated this 8th day of February, 1957.

FRANKLIN RITTENHOUSE,
United States Attorney,

By /s/ HERBERT F. AHLSWEDE,
Assistant U. S. Attorney. [17]

[Endorsed]: Filed February 8, 1957.

[Title of District Court and Cause.]

PRELIMINARY INJUNCTION

This Cause came on to be heard pursuant to order to show cause why a preliminary injunction should not issue and the Court having considered the verified complaint on file herein and having heard oral evidence in open court, the Court makes the following

Findings of Fact

1. That plaintiff owns the following land: T 20 N., R 19 E., M. D. B. & M. E½; E½ of W½ excepting the southerly 200 feet thereof.

2. That the United States Government owns a strip of land 200 feet wide across the entire south end of Section 5, Township 20 N., Range 19 E., M. D. B. & M.

3. That plaintiff is being denied access to his property above described by a gate closed and padlocked by the defendant in a fence maintained by the defendant on the section line dividing Section 8 and Section 5, Township 20 N., Range 19 E., M. D. B. & M.

4. That the gate in the fence above described is located on the section line between Section 5 and Section 8 [18] Township 20 N., Range 19 E., M. D. B. & M., approximately 2500 feet east of the southwest corner of Section 5, Township 20 North, Range 19 East.

5. That the fence aforesaid maintained by de-

fendant obstructs all access which plaintiff has to his property above described.

6. That plaintiff has no other convenient means of access to his property above described save and except through the gate aforesaid.

7. That plaintiff currently has under construction certain buildings situate on his property above described and plaintiff will not be able to complete construction of these buildings unless he is granted access to his property.

8. That plaintiff has other buildings which he has contracted to move and which he must move or lose; that the only property plaintiff has to which he can move the aforesaid buildings is his property above described.

9. That if plaintiff is denied access to his property, the value of the property is seriously impaired.

10. That the damage, if any, which may be suffered by the Government in granting plaintiff access to his property through the gate above described will be negligible in the event it is ultimately concluded at the trial of this matter that plaintiff has no lawful right of way or easement across the southerly 200 feet of Section 5 above described.

On the basis of the foregoing, the Court makes the following

Conclusions of Law

1. That if plaintiff is not granted access to his property pending a final determination of this matter, he will suffer great and irreparable injury in that:

a. He will be unable to complete the construction [19] on his buildings now under construction on his land above described.

b. That plaintiff will not be able to move the buildings which he has contracted to move and will therefore lose them; that the buildings cannot be replaced by plaintiff.

c. That the value of plaintiff's property will be seriously impaired.

2. That plaintiff has no adequate remedy at law.

It Is Therefore Ordered:

That defendant, his agents, servants, employees and attorneys, and all persons in active concert and participation with him, be and they hereby are restrained and enjoined, pending the determination of this action, from obstructing access of plaintiff, his agents, servants, employees and successors in interest to and from his property through the gate in the fence above described and via the Old Purdy Highway across the southerly 200 feet of Section 5 to where it abuts on plaintiff's property in the E½ of the W½ of Section 5, Township 20 N., Range 19 E., M. D. B. & M.; provided that plaintiff first give security in the sum of $2500 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined.

Dated: February 8, 1957.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed February 11, 1957.

In the United States District Court
for the District of Nevada

No. 1293

JOHN CAVANAUGH, Plaintiff,

vs.

B. E. McKENZIE, Defendant.

ORDER GRANTING MOTION TO DISMISS ACTION

The history of this matter is as follows: On January 24th, 1957, plaintiff filed his petition in the Second Judicial District Court of the State of Nevada, in and for Washoe County. In it plaintiff alleged himself the owner of certain lands contiguous to the government owned Stead Air Force Base; that defendant was and is the Commanding Officer at Stead Air Force Base; that defendant had obstructed a dirt road leading across a portion of the Base by placing a gate across the same; that plaintiff and his predecessors had enjoyed right of access to the lands presently owned by him over the dirt road now closed; that he was irreparably injured. The prayer was for a temporary restraining order, an order to show cause, and an injunction requiring the defendant to remove the gate complained of and to thereafter refrain from interfering with plaintiff's right of ingress and egress to his contiguous lands over the dirt road across the Base property. The temporary restraining order

and order to show cause was issued in the state court.

On removal to the federal court the restraining order expired of its own limitation, and plaintiff thereupon filed his amended complaint, which was in all respects [21] identical with the original complaint except that it detailed the nature of the irreparable injury that plaintiff would suffer unless the relief prayed for was granted, and the allegation contained in Paragraph V of the original complaint was entirely omitted. This paragraph which appeared in the original complaint, but was omitted in the amended complaint, alleged that the action of the defendant, as Commanding Officer of the Base, in closing the gate across the dirt road, was in excess of his authority as such officer.

Pursuant to the prayer of the amended complaint a restraining order and order to show cause was issued out of this Court, and on hearing the Court issued its preliminary injunction. Following this the government, on behalf of the Commanding Officer of the Base, defendant herein, filed its motion to dismiss the action "because it is in substance and effect against the United States of America, which has not consented to be sued or waived its immunity from suit." The motion was based on the pleadings, records, and testimony filed and taken in the matter. Briefs were filed and argued by respective counsel, and the matter submitted to the Court for determination.

Movant argues that the Court should inquire into the interests of the government in the matter be-

cause the plaintiff seeks specific relief against the sovereign; that the injunction, if issued, must of necessity expend itself on the land of the United States, and thus the United States is an indispensable party. Plaintiff, in resisting the motion, argues that this is not a suit against the government but is a suit directed against the defendant as an individual. Thus the only issue before the Court is whether the Court has jurisdiction to entertain this action, and that turns on the proposition whether or not [22] this is in effect an action against the United States in a matter in which it has not consented to be sued, or in which it has waived its immunity from suit.

Parenthetically, it should be noted that during oral argument on the Motion to Dismiss counsel for both parties freely alluded to and argued the evidence adduced upon the hearing of the show cause order. We are of the opinion that such evidence, which is not in dispute, is properly before the Court in its consideration of this motion.

> "A motion to dismiss now performs the office of the general demurrer under the former practice. Under Rule 7(c), supra, demurrers, pleas and exceptions for insufficiency of a complaint cannot be used, and a 'speaking motion' to dismiss may be utilized to present the defenses enumerated in Rule 12(b), supra. Affidavits, depositions and other documentary proof may be utilized when the movant seeks a dismissal of the case upon any of the first five defenses enumerated in Rule 12(b), supra.

The very nature of those defenses is such as to admit of proof by ex parte statements in most instances. Moore's Federal Procedure, Vol. 1, pages 646, 647 and appendix. However, the court should never grant a motion presenting any of the said defenses if any material fact is disputed by counter affidavits, depositions or documents. Where the enumerated sixth defense 'failure to state a claim upon which relief can be granted' is relied upon the court should determine the motion upon the allegations of the complaint and undisputed facts as they appear from the pleadings, orders and records of the case. (Citing case)''

Yudin v. Carroll et al,
(DC Ark, 1944) 57 F. Supp. 793

Now, on the question of lack of jurisdiction. The following rules which constitute historically sound law form the background for a consideration of this case. Suits against the government must be considered against a background of complete immunity:

''It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by Congress.''

United States v. Shaw
309 US 495 [23]

Consonant with this view, it has been stated that permission to sue the sovereign will not be implied:

''It is fundamental that the United States cannot be sued without its permission, and that

permission must be specifically granted by Congress. It will not be implied."

North Dakota - Montana Wheat Growers' Ass'n. v. United States
(CCA 8, 1933) 66 F. 2d 573, Cert. Den. 291 US 672

And, further, that the United States

"* * * Cannot be subjected to legal proceedings, at law or in equity, without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress."

Belknap v. Schield
161 US 10

The Court, in considering such suits must look into the entire record:

"The Government's interest must be determined in each case 'by the essential nature and effect of the proceeding, as it appears from the entire record.' Re New York, 256 US 490, 500, 65 L. Ed. 1057, 1062, 41 S Ct 588."

Mine Safety Appliances Co. v. Forrestal
326 US 371

If the officers who are sued in their individual or personal capacity have no individual or personal interest in the controversy, and if the suit seeks to control their actions and exercise of functions as officers of the United States, the immunity from suit is applicable.

"'* * * the inference is, that where it is man-

ifest upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the state, is one of jurisdiction;' * * *''

Belknap v. Schield
161 US 10

"Since the proposed action is the performance of a duty imposed by the statute of the state upon state officials through whom alone the state [24] can act, restraint of their action, which the bill of complaint prays, is restraining of state action, and the suit is in substance one against the state * * *''

Worcester County Trust Co. v. Riley
302 US 292

"The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract, and thus prevent the inauguration of the experimental service contemplated by the Act of 1914,—a direct interference with one of the processes of Government. The argument to the contrary assumes to treat defendant not as an official, but as an individual who, although happening to hold public office, was threatening to perpetuate an unlawful act out-

side of its functions. But the averments of the bill make it clear that defendant was without personal interest, and was acting solely in his official capacity, and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do."

Wells v. Roper
246 US 335

The suit nominally against an officer will be considered one against the sovereign, if the specific relief sought will expend itself on public property.

"If the initial nature and effect of a suit is such as to make plain that the judgment sought will expend itself on public treasury or domain, or interfere with the public administration, the suit is one against the sovereign."

Land v. Dollar
330 US 371

The Supreme Court has recently ruled upon the precise question in Larson v. Domestic and Foreign Commerce Corporation, 337 US 682. It appears in the Larson case that the plaintiff had contracted to purchase coal from the War Assets Administration. A controversy arose over the construction of the contract and the War Assets Administration took the view that a breach had occurred and it was free to sell to other parties. Plaintiff sought an injunction prohibiting Larson, head of the WAA, from selling [25] or delivering to the other purchaser. Defendant sought to dismiss upon the

ground the Court was without jurisdiction because the suit was one against the United States. The Supreme Court held that the suit must fail; that in determining the sovereign's immunity from suit actions of an officer which do not conflict with the terms of his statutory authority, whether or not they are tortious under general law, cannot be enjoined if they would be regarded as the actions of a private principal under the rules of agency.

> "We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign."
>
> Larson v. Domestic and Foreign Corp.
> 337 US 682

It is fair to note that Mr. Justice Frankfurter dissented on the ground the suit was in effect one to determine whether Larson was within his authority, and the District Court did have jurisdiction over the controversy for the purpose of determining that issue. It should also be noted that the Supreme Court, after setting down the general rule

announced above, laid down two classes of cases wherein an officer of the Government might be sued, without joining the sovereign. One class is where the statute or order conferring power upon the officer to act is unconstitutional or otherwise invalid, and the other is where the officer is not acting within the statutory limitation of his powers. The plaintiff, relying on the cases of United States v. Lee, 106 US 196, and Land v. Dollar, 330 US 731, [26] seeks to bring his suit within the latter exception. Both cases are exhaustively treated in the Larson case, and need not be reconsidered here.

From the test laid down in the Larson case, which appears to culminate all prior legal thinking on the subject of Governmental immunity, if plaintiff will sue an officer of the government for some act in connection with his office under the second exception noted above, and obtain specific relief, he must get over two hurdles. First, he must plead and prove the "statutory limitation" which has been exceeded and secondly, the act must not be the act of the United States, by the application of general agency principles.

In applying the "statutory limitation" test we should go directly to the language of the Larson case:

> "The application of this principle to the present case is clear. The very basis of the respondent's action is that the Administrator was an officer of the Government, validly appointed to administer its sales program and therefore authorized to enter, through his sub-

ordinates, into a binding contract concerning the sale of the Government's coal. There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation he, like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with. His action in so doing in this case was, therefore, within his authority even if, for the purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to the respondent under the contract. There is no claim that his action constituted an unconstitutional taking." (Emphasis supplied.)

Larson v. Domestic and Foreign Corp., supra.

And, again,

"It is important to note that in such cases the relief can be granted, without impleding the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently [27] recognized, upon the decision which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies."

Larson v. Domestic and Foreign Corp., supra.

There has been an unfortunate choice or use of words in some portions of the Larson case which may have caused plaintiff to misconceive a remedy. Thus, "* * * if the actions * * * do not conflict with the terms of his valid statutory authority * * *" and, if the Federal officer is "acting in excess of his authority," are examples. What the Court meant, and what the Court said in expressly treating the subject, is that a mere allegation in the complaint that the defendant's actions were "beyond any authority conferred upon him," or that he has "no authority," is not sufficient. There must be some express allegation of some express statutory limitation upon the actions of the officer, and an allegation of an act in excess thereof. The complaint here completely fails in that respect.

If the "agency test" as laid down in the Larson case and considered in the light of the historical background noted above, is applied here, it is inescapable that the action of the defendant, Colonel McKenzie, were the actions of his principal, the United States of America. It was neither alleged or shown that the defendant had any personal interest in the subject easement. The defendant testified that while he had a personal view on the matter at hand, it was of no moment here. On the contrary, the positive testimony is to the effect the interest of the defendant was one of protecting perimeter lighting cables which lay under the easement, close to the surface of the earth, and which were a part of the Air Force Base Installation and United States Government property. There was

also testimony that part of the defendant's official duties was the protection [28] of the property of the government under his command. The defendant was employed by the United States of America to perform service in its affairs. It is elementary that the defendant's conduct in the performance of the service is controlled or is subject to the right to control by the United States of America. Specific relief here must, of necessity, expend itself on the public domain.

The Court is of the opinion that this suit must fail, as one against the United States of America. Our conclusion is based upon the ground that the actions of the defendant do not exceed an express statutory limitation, and are those of a private principal under the normal rules of agency.

It is Ordered that the defendant's motion to dismiss the above entitled action be, and the same is, hereby granted.

Dated at Carson City, Nevada, this 25th day of March, 1957.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed March 26, 1957.

In The United States District Court,
For The District of Nevada

No. 1293

JOHN CAVANAUGH, Plaintiff,

vs.

B. E. McKENZIE, Defendant.

TRANSCRIPT OF PROCEEDINGS ON MOTION TO DISMISS

Before: Hon. John R. Ross, Judge.

Be It Remembered, that the above-entitled matter came on for hearing before the Court at Carson City, Nevada, on Tuesday, the 26th of February, 1957, at the hour of ten o'clock A.M.

Appearances: William O. Bradley, Esq., Attorney for Plaintiff. Herbert F. Alswede, Esq., Assistant U. S. Attorney, Attorney for Defendant.

The following proceedings were had:

The Court: Mrs. Reporter, let your record show this is matter No. 1293, John Cavanaugh, plaintiff, vs. B. E. McKenzie, defendant. The matter set for hearing at this time is motion on the part of the defendant to dismiss the cause of action, this on the ground that the Court is without jurisdiction to entertain this action because it is, in substance and effect, against the United States of America, the United States [30] having not consented to

be sued or having waived its immunity to suit. You may proceed, gentlemen.

Mr. Alswede: Your Honor, the motion presently before the Court is the motion of the defendant, B. E. McKenzie, to dismiss the action for lack of jurisdiction over the subject matter. In this regard, the defendant has three reasons for making such motion: (1) plaintiff, John Cavanaugh, has not exhausted his administrative remedies prior to suit; (2) that the suit is against an officer of the United States of America and is, therefore, a suit in effect against the United States of America; and (3) that this suit is involving rights over and to property, of which the United States government is the owner in fee simple.

Now we will take up our first proposition, that the plaintiff has not exhausted his administrative remedies. It was brought out in the hearing for preliminary injunction that John Cavanaugh, some time in the past, has applied to the United States government, through the Air Force, for an easement or a license to cross the disputed two hundred foot strip on the south section line of Section 5. His application was sent back and forth to Washington through the engineers, through the Air Force, and Mr. Cavanaugh was offered a five-year revocable license. He was informed by Col. McKenzie the fact that he was offered a five-year revocable license and made no reply, neither accepted or rejected, but remained silent. Mr. Cavanaugh has [31] an administrative remedy at hand, that of

accepting the five-year revocable license, in which event suit to enjoin the defendant, B. E. McKenzie from maintaining this fence would be unnecessary.

Our second proposition is this is a suit against an officer of the United States of America. The action is nominally directed against B. E. McKenzie as an individual and it is alleged in the complaint that the defendant, B. E. McKenzie, has acted outside of any scope of his authority conferred upon him as Commanding Officer of Stead Air Force Base. We invite the Court's attention to page 2 of the brief of B. E. McKenzie on the motion to dismiss, where proposition for injunctive relief is sought against officers of the government, it becomes the duty of the Court to inquire into the interests of the government in the controversy. This proposition is well supported by the cases outlined on page 2 of the defendant McKenzie's brief. It was brought out in the hearing for preliminary injunction that B. E. McKenzie is a colonel in the United States Air Force, appointed as such under the laws of the United States of America, pursuant to regulations of the United States Air Force, and was directed to take command of the Stead Air Force Base. Col. McKenzie is in fact Commander of the Stead Air Force Base. It is an inherent duty and an inherent right of the commanding officer of a military installation to erect such fences and such gates and take such steps as he deems [32] necessary for the security of his installation. The Supreme Court of the United States, in the case of

Larson vs. Domestic and Foreign Commerce Corp., has stated the law quite well and we have outlined it on page 6 of the defendant's brief. The Court states:

"We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency."

We submit to this Court that the actions of the defendant McKenzie in erecting the fence, maintaining the gate, do not conflict with the terms of his authority, statutory authority, that authority vested in him by the acts of Congress and determined in the Air Force regulations, whereby he was appointed Commanding Officer of the Stead Air Force Base and is charged with the security thereof.

Further, it was brought out in the hearing on preliminary injunction that the fence, the maintenance of which the plaintiff seeks to have enjoined, is located on government property. It is brought out by the testimony that the fence is located six inches within the northern part of the south section line of Section 5. The fence is on government property. Being [33] on government property, it is a government fence. The injunction then, to be of any value, must of necessity extend itself on government property and upon the lands of the United States of America and if you have an injunction that extends itself upon government property and upon government lines, we submit that the

United States of America must be made a party to the action, and not consenting to be joined as a party to the action and not having waived its immunity from suit, that this Court has no jurisdiction to proceed in the matter farther.

Our third proposition is that this suit involves an easement over government property. Plaintiff has alleged in his complaint that he has an easement over a two hundred foot strip on the south side of the southwest quarter of Section 5. It was denied in open court by Col. McKenzie, the Commander of the Stead Air Force Base or the Installations Officer, who is in possession of the legal records dealing with the real estate of Stead Air Force Base, that no easement across that property exists. We should like to invite the Court's attention to the fact that the Court must necessarily decide whether or not the plaintiff, John Cavanaugh, has an easement across this two hundred foot strip before the Court could decide whether or not the obstruction is wrongful. If there is no easement, there could be no wrongful obstruction. The fact whether or not there is an easement has been put in issue before this Court. The Court must then necessarily decide whether the plaintiff, [34] John Cavanaugh, has an easement across the property. It has been admitted by John Cavanaugh, in the hearing on the preliminary injunction, that the United States of America owns title to the two hundred foot strip over which he claims an easement. The proposition determining the rights of third persons to lands owned by the United States was brought before the

Supreme Court in the case of Minnesota vs. United States, 305 U. S. Reports, reported at page 382. In this case the State of Minnesota sought to condemn a right-of-way for easement across property owned by the United States in fee simple. The Court held that:

"The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States. (citing cases.) It is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees. As the United States owns the fee of these parcels, the right-of-way cannot be condemned without making it a party. The exemption of the United States from being sued without its consent extends to a suit by a State. (Citing cases.) Hence Minnesota cannot maintain this suit against the [35] United States unless authorized by some act of Congress."

So it should also extend to a suit by private citizens. We submit to the Court that this suit may not be maintained, in view of the immunity of the United States from being sued and that the United States is a necessary and proper party to be joined in any action in which the property of the United States is involved and in which a third party seeks to condemn an easement or right-of-way.

In closing I should like to direct and invite the Court's attention to the prayer in paragraph 3 of the plaintiff's complaint, wherein the plaintiff asks that the defendant and his successors in interest be

enjoined from maintaining any fence or gate. I ask successors in interest to what? If this is a suit directed to B. E. McKenzie as an individual, and not acting in the scope of his authority, do we have any successors in interest? I submit this is, in effect, an admission by the plaintiff that this is a suit against B. E. McKenzie as Commanding Officer of Stead Air Force Base and his successors in interest, referred to in paragraph 3 of the prayer for relief in the plaintiff's complaint relates to any other commanders of Stead Air Force Base which follow Col. McKenzie, that this is then a suit against an officer of the United States and it is a suit involving government property, which the Court must necessarily determine whether or not there [36] is an easement and that all administrative remedies have not been exhausted. I, therefore, submit that the Court does not have jurisdiction to proceed further in the matter and ask that the case be dismissed.

The Court: I observe, counsel, that you said in your discussion that this involves a controversy over an easement on property, the fee of which was owned by the United States. I assume your position is that the United States has fee title to the two hundred foot strip?

Mr. Alswede: That is correct, your Honor.

The Court: Which is involved here. Now I observe that in the brief filed in support of the motion, you make the statement that the plaintiff alleges that the defendant obstructed plaintiff's means of ingress to and egress from plaintiff's

property by maintaining a locked gate and fence on government property. Now is there any controversy between the parties there that this property is fee property of the government and not property in the nature of public domain?

Mr. Bradley: Where the obstruction exists, your Honor?

The Court: Yes.

Mr. Bradley: We maintain that this is on the section line. [37]

The Court: That is true, I recall that it is your contention that counsel has said it is six inches within, but assuming that to be true, the two hundred foot strip is fee property of the government, not public domain?

Mr. Bradley: On that point, your Honor, I would not stipulate. That particular land, as I recall, was owned by the Farmers Home Administration, as I recall, and what disposition they have made of it, I wouldn't be in position to say. It is owned by the government.

The Court: But in any event, it would have been withdrawn from the public domain as we know it, and was not open to acquisition by private individuals in the nature of homesteading or acquisition. You may proceed, Mr. Bradley.

Mr. Bradley: First, your Honor, may it please the Court, in response to Mr. Alswede's motion, the first item that the plaintiff has not exhausted his administrative remedies, the basis of our action in this matter is that we have an existing right-of-

way as a matter of law. That has been terminated by an act, in excess of the authority of the Commanding Officer of Stead Air Force Base. The question of administrative remedies, in my opinion, does not enter into the matter. We do not seek to appeal from the offer of a revocable five-year license, in lieu of our right, as a matter of law, to an easement across the [38] property. In addition, your Honor, we have no quarrel with the case of Minnesota vs. United States, or the case of Utah Power & Light Company vs. United States, cited by Mr. Alswede in his brief. The case of Minnesota vs. United States was a condemnation proceeding, in which a state sought to condemn a right-of-way across land owned by the United States government. I would certainly be the first to concede that the United States is an essential party to such an action. In this particular case, your Honor, we contend that upon transfer of the land by the United States government to the Farmers Home Administration, an easement came into being as a matter of law, to which Mr. Cavanaugh's property is entitled as a matter of law and which Mr. McKenzie had no right to terminate. It is axiomatic, your Honor, that upon motion to dismiss the complaint of the plaintiff must be considered in the light most favorable to the plaintiff and all allegations well pleaded are deemed true. In support of that contention, I cite the case of Coole vs. International Shoe Co., 142 Fed. (2), 318, 93 Fed. Supp., 773. We have pleaded ownership of the property, to which our access has been restricted. We plead

an easement in existence, and we plead a wrongful termination of that easement by Col. McKenzie.

With reference to the proposition that it is beyond Mr. McKenzie's authority to terminate the existing easement, we have no better authority for that statement than Col. McKenzie [39] himself, your Honor. You recall on the hearing to show cause, Col. McKenzie testified that he had no authority to terminate existing easements. The case of Larson vs. Domestic & Foreign Corporation, cited by Mr. Alswede in his brief, is absolutely in conformity with plaintiff's position in this matter, your Honor. I read from page 6 of Mr. Alswede's brief:

"We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign."

The case holds that where the actions do not conflict with the statutory authority, they are the actions of the sovereign. Where they do conflict, they are not the actions of the sovereign. That line of cases is the great weight and authority in the Supreme Court of the United States, your Honor.

Another case cited in defendant's brief is the case of Land vs. Dollar, [40] in the Supreme Court of the United States, on exactly the same point.

In Land vs. Dollar case, Mr. Dollar had pledged securities with the United States Maritime Commission in return for a loan of money. He repaid the loan and requested those securities be returned. The Maritime Commission took the position that the securities had become the property of the United States government. Mr. Dollar then instituted suit against the Maritime Commission for wrongfully *d*etaining his property and sought to have the property returned. The government's defense to the action was that was, in effect, a suit against the sovereign, to which the sovereign had not consented, and the court, therefore, did not have jurisdiction. The Supreme Court rejected that contention and held the officers were wrongfully withholding property of Mr. Dollar, took jurisdiction and made the officers of the United States Maritime Commission return the stock.

The main case, your Honor, that all these cases rely on in this question of sovereign immunity is the case of United States vs. Lee, 106 U. S. In the case of United States vs. Lee, your Honor, the plaintiff was the daughter of the granddaughter of General Robert E. Lee and she allegedly owned sixty acres within the Arlington National Cemetery, known as the Arlington Estates. Two military officers, one named Kaufman and one named Strong, rejected Mrs. Lee's claim to her property. [41] They contended it was property owned by the

United States government. Mrs. Lee instituted suit in the State court in Virginia against Kaufman and Strong individually. The case went to trial and the government ultimately contended that it was in effect a suit against the United States government, to which the United States had not consented, and that the Court, therefore, had no jurisdiction. The Supreme Court of the United States rejected this contention and the opinion written by Chief Justice Miller holds as follows, and I quote from the decision:

"Under our system the people, who are there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him, for the protection and enforcement of that right." [42] The Supreme Court goes on to hold, your Honor, and I quote again from the decision:

"In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his

action, and the State may stand behind him as a real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

In our case, your Honor, our pleadings are clear. We plead against Col. B. E. McKenzie. We allege he is the Commanding Officer of the Stead Air Force Base; we do not deny that. We also allege he exceeded his statutory authority in terminating an easement that existed, not an easement which we seek to condemn. Mr. Justice Miller went on to say:

"In the case supposed, the court has before it a plaintiff capable of suing * * *"

As we have here, your Honor:

"* * * A defendant who has no personal exemption from suit and a cause of action cognizable in the court; * * *"

Exactly what we have here. In the United States vs. Lee the [43] defendants were military officers also:

"* * * a case within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he *assets* in his declaration."

Now as Mr. Alswede pointed out, your Honor, the Court must necessarily decide whether or not we have an easement. We have alleged it. How can the Court decide whether or not the easement

exists without assuming jurisdiction? To follow the position of the United States government in this case and Mr. Alswede in this case, to its logical conclusion would ultimately result in a situation as far-fetched as this, your Honor—assume that an officer of the government, assertedly acting within his authority, should place a cordon around some private property owned by an individual and say, "You are denied access to your property." Even though the access is way beyond the authority of the officer, he denies access to the property. Then when the individual, whose rights have been denied, comes to court for relief, they stand up and say, "You can't raise the question; the Court has no jurisdiction. It is a question of sovereign immunity. The man was acting as an officer of the government, in his capacity as an officer of [44] the government, therefore the right or wrong of his acts cannot be questioned. It is in effect a suit against the United States government, a suit against the sovereign, to which the sovereign has not consented." Justice Miller, in the case of United States vs. Lee, saw the danger that existed in such a theory and rejected it. The Supreme Court of the United States, in all cases that have come down on that point, have rejected that proposition. The case of Land vs. Dollar is in conformity with United States vs. Lee, as is the case of Larson vs. Domestic & Foreign Corporation.

The law on this question, your Honor, has been well stated in the case of Rank vs. Krug, 90 Fed. Suppl., page 773. In that case the plaintiffs brought

suit against several officials of the Bureau of Reclamation in their individual capacity, alleging that they had exceeded their authority in withholding water property rights which they had no right to do and sought a mandatory injunction from the Court, requiring the officers involved to release the water. The action was filed in the State court of California and removed to federal court. Upon removal, the government moved for dismissal, on the ground that the United States was an indispensable party, was in effect a suit against the United States, to which the United States had not consented. In that case, your Honor, the Court said:

"It is contended that the United States is [45] an indispensable party; that this is in effect a suit against the United States, and that no permission has been given to sue the United States in such an action. But as seen from the foregoing discussion the defendants in withholding the water from the plaintiff's use, and threatening to do so, are exceeding any powers granted to them by the Act of Congress. That being so, neither the United States nor the Secretary of the Interior are indispensable parties, and this is not a suit against the United States. The situation falls squarely within the doctrine of the test whether or not an injunctive decree would expend itself upon the United States because of authorization of the alleged taking of the plaintiff's rights by an Act of Congress, or will prevent the defendants from doing acts which are unlawful because not authorized.

"In view of the fact that no statutory authority

exists for the actions of the defendants, and that they are withholding water from the plaintiffs in excess of and contrary to the powers conferred upon them, such a decree obviously brings the situation clearly [46] within the line of cases *if* United States vs. Lee, Philadelphia Company vs. Stinson * * *"

all Supreme Court cases:

"Ickes vs. Fox * * *"

and so forth. That is exactly our position here.

Now I feel that the Court must construe our pleading, you must take the allegations of our complaint as true, for the purposes of considering this motion to dismiss. In the complaint we allege an easement as a matter of law. We have an easement. That easement was wrongfully terminated by Col. McKenzie because Col. McKenzie himself testified that he had no power or authority either to grant a permanent easement or to destroy a permanent easement that was in existence. Therefore, your Honor, the case falls squarely within the decision of United States vs. Lee, Rank vs. Krug, Land vs. Dollar, and so on.

The next point, your Honor, which I touched on briefly in our opening and touch briefly again, is the proposition for which the government has cited the case of Minnesota vs. United States, that if you are seeking to condemn right-of-way across government property, the United States is an indispensable party. I agree with that myself. That is not the situation here. Here we seek to have our existing easement confirmed. I therefore, your Honor,

respectfully request that the motion be denied and the defendant be required to answer forthwith. [47]

The Court: Anything further, Mr. Alswede?

Mr. Alswede: May it please the Court, in answering the plaintiff's contention that there is an easement in being and that the Court is merely confirming the easement, first I would like to invite the Court's attention to the fact established in the hearing for temporary injunction, the admission by the plaintiff, John Cavanaugh, that he applied for an easement across this strip of land owned by the government. I submit, if he had an easement, your Honor, why would he apply then to the United States Air Force and to the United States for an easement, if he already had it? It seems to me he wouldn't re-apply for it. I think that this is admission on the part of the plaintiff that he had no easement; and, second, I invite your attention to the admission of plaintiff's counsel that the Court must necessarily decide that the plaintiff has an easement. In deciding whether there is an easement or there is not an easement, the Court is adjudicating the plaintiff, John Cavanaugh's rights in property owned by the United States of America. In doing so, I resubmit that the United States of America is an indispensable party, since it is the owner in fee simple of that property, and any rights which John Cavanaugh may have in that property would necessarily detract from the rights which the United States of America has; that, therefore, the United States of America is an indispensable party, and since the United States of

America [48] has not consented to be sued or joined in this action, it has not waived immunity, that the Court does not have jurisdiction to proceed further, and we ask that the action be dismissed.

The Court: There is no question involved here, is there, that this easement, if one does exist and if it is directed to the plaintiff, would interfere with the military potentialities of the Reservation?

Mr. Alswede: Would you restate the question, your Honor?

The Court: Simply it is this—do we have any question of interfering with the military purposes of the Air Base?

Mr. Alswede: Yes, your Honor, I believe if this easement was adjudicated in favor of Mr. Cavanaugh that it would materially affect the rights of the United States and the United States Air Force.

Mr. Bradley: Your Honor, may I call to your attention, sir, the case of Meigs vs. McClung, 9 Cranch 11. In that case, your Honor, a Supreme Court case, the property sued for was land on which the United States had a garrison erected at a cost of thirty thousand dollars, and the defendants were the military officers in possession and the very question now in issue was raised by these officers. They insisted that the action could not be maintained against them [49] because the land was occupied by the United States troops, and the defendants as officers of the United States, for the benefit of the United States and by their direction. They further insisted that the United States had a right, by the

Constitution, to appropriate the property of the individual citizen. The Court below overruled these objections and held that the title being in plaintiff he might recover, and that if the land was private property, the United States could not have intended to deprive the individual of it without making him compensation therefor.

Mr. Alswede: In reply to that, your Honor, we think it would be well to point out that in that instance the United States merely was occupying the land and did not have fee simple title, which we do have in this case.

The Court: Do either counsel desire to submit further arguments in the matter?

Mr. Alswede: I am willing to submit it on the oral argument.

Mr. Bradley: I will submit it on oral arguments.

The Court: The record will show that the motion, being argued, it is taken under advisement. [50]

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between Counsel for the plaintiff and defendant that the Transcript of Proceedings on the hearing of defendant's motion to dismiss inadvertently by virtue of a clerical mistake omitted the following proposition argued by William O. Bradley at

the hearing on the motion to dismiss; that the Transcript of Proceedings be corrected pursuant to Rule 60 A, Federal Rules of Civil Procedure, to include the following argument urged by Mr. Bradley at the hearing on defendant's motion to dismiss:

"The easement pleaded by Mr. Cavanaugh in his Amended Complaint on file herein is an incorporeal hereditament, which is a property right. The defendant, Colonel B. E. McKenzie, in terminating this easement absolutely destroyed a property right owned by Mr. Cavanaugh, which constitutes a deprivation of property without due process of law contrary to the Fifth Amendment of the Constitution of the United States of America."

Dated this 1st day of April, 1957. [52]

GRUBIC, DRENDEL & BRADLEY,

/s/ By WILLIAM O. BRADLEY,
Attorneys for Plaintiff.

/s/ HERBERT F. AHLSWEDE,
Assistant United States Attorney, Attorney for Defendant.

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

ORDER

Pursuant to written stipulation entered into between Counsel for the respective parties herein,

It Is Hereby Ordered that the Transcript of the Proceedings on the hearing on defendant's Motion to Dismiss be, and the same hereby is, amended to include the following proposition argued by Mr. Bradley in opposition to defendant's Motion to Dismiss, but inadvertently omitted from the Transcript by virtue of a clerical error:

"The easement pleaded by Mr. Cavanaugh in his Amended Complaint on file herein is an incorporeal hereditament, which is a property right. The defendant, Colonel B. E. McKenzie, in terminating this easement absolutely destroyed a property right owned by Mr. Cavanaugh, which constitutes a deprivation of property without due process of law contrary to the Fifth Amendment of the Constitution of the United States of America."

Dated this 2nd day of April, 1957.

/s/ JOHN R. ROSS,
District Judge. [54]

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

HEARING ON ORDER TO SHOW CAUSE

TESTIMONY OF B. E. McKENZIE

Be It Remembered, that the above-entitled matter came on for hearing before the Court at Carson City, Nevada, on Friday, the 8th of February, 1957, at the hour of two o'clock P.M.

Appearances: William O. Bradley, Esq., Attorney for Plaintiff. Franklin P. Rittenhouse, Esq., United States District Attorney and Herbert F. Alswede, Esq., Asst. United States Attorney, Attorneys for Defendant.

The following proceedings were had:

The Court: Mrs. Reporter, let your record show that this is the time set for the hearing on order to show cause and temporary restraining order issued in the matter of John Cavanaugh, plaintiff, vs. B. E. McKenzie, defendant, action No. 1293. The order was entered February 4th of this year, at the hour of 11:40 A.M. You may proceed, gentlemen. [55]

B. E. McKENZIE

being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Alswede): Would you state your name and occupation? A. Burton E. McKenzie.

Q. And your occupation?

(Testimony of B. E. McKenzie.)

A. Colonel United States Air Force, Commanding Officer Stead Air Force Base.

Q. Now, Colonel, are you familiar with the complaint that has been filed in this action?

A. I am.

Q. And the map that is attached thereto?

A. Yes.

Q. In this complaint and amended complaint that is on file, the plaintiff has alleged that you have caused a padlocked gate to be placed across government property and have maintained a fence, which is obstructing his means of ingress to and egress from his property. Was this fence and gate in existence at the time you took command of the Air Base? A. Yes, sir.

Q. And when did you take command of the Air Base? A. July 20, 1955.

Q. And since that time has the gate been kept locked and the fence maintained across government property?

A. Yes. The fence was constructed long before my arrival at this station as a former boundary fence on the property. It [56] has been there, to my knowledge, for some time prior to, and to my knowledge since, I have been there.

Q. And you are maintaining the fence and the gate? A. We are.

Q. Will you tell the Court why you are maintaining the fence and the gate?

A. Well, as in the case of any military reserva-

(Testimony of B. E. McKenzie.)

tion, the border fence is protected and maintained for security purposes and the boundary definition of the government reservation.

Q. And are you maintaining this fence and gate in the exercise of your command as the Commanding Officer of Stead Air Force Base?

A. Due to the fact that I am responsible for the security of the government property within the fence, we are.

The Court: Is that fence in that area, Colonel, the military property fence, I mean in the immediate area?

A. Yes, sir, there is a fence and right close to that near the other building that joins it.

Q. Is that your fence too, the government fence?

A. Yes.

Q. It too is a part of the enclosure fenced on government reservation?

A. Yes, sir. It is the exterior boundary of our lines.

Q. What I am getting at is this, does Mr. Cavanaugh have any [57] drift fence or boundary fence abutting against the reservation, the boundary lines? A. I couldn't say, sir.

Q. In that particular area?

A. Not to my knowledge.

The Court: I ask these questions because there is attached to the complaint a map, which does not mean very much to the Court. I do not know from it where Mr. Cavanaugh is attempting to go

(Testimony of B. E. McKenzie.)

over, from what direction, and consequently I am up in the air.

Mr. Bradley: Your Honor, I will explain that. I have the plat of the map here, your Honor.

Mr. Alswede: We have no further questions.

The Court: You said, Colonel, that this particular fence, with which we are concerned, had been erected and maintained for, so far as you know, considerable time before you came to the Base in 1955?

A. That is correct, sir. In addition, I have government notices posted on the fence.

Q. And you say that since your coming there, the fence has been maintained? A. Yes, it has.

Q. And I assume when you state that, you mean that the gate was also maintained? [58]

A. That is correct, sir. The gate, as I understand it, was originally placed at this particular location to facilitate the power company ingress and egress to maintain power lines there on our Base.

Q. Has that gate been kept actually locked?

A. Yes, sir, until approximately two weeks ago, when I received temporary restraining order, at which time I directed that the gate be unlocked.

Q. If a person desired to have ingress or egress through the gate, prior to the service of the restraining order on you, it would be necessary for that person to receive a key from some authority?

A. Yes, sir.

Q. That was the practice you followed?

(Testimony of B. E. McKenzie.)

A. Yes, sir.

Q. During the period of time that you have been at the Base, since 1955, have you permitted this plaintiff to use the gate? A. Yes, sir.

Q. And on each instance has he made request of you or your proper officer for the key?

A. Yes, sir.

Q. And returned it?

A. I don't know whether he was required to return it.

Q. And he obtained permission?

A. Yes, sir, with one exception. Originally, early in the month [59] of August he, or his workmen, did go through the gate by tearing it down, which is the first time, to my knowledge, he had used that point of egress. At a later date, when he requested permission to enter, in order to protect the two buildings he had, I gave him written permission to do so for a period of two weeks and also he did go on six weeks, at which time he winterized the buildings, not being a permanent easement, which I am not empowered to give.

Q. Do you know whether or not this fence is actually on or within the boundary lines of the federal property?

A. I couldn't say whether it is on the property line or within the property line.

Q. Would you say that was near, on, or within the property line?

A. I presume it to be on the property line.

Q. That also applies to the gate?

(Testimony of B. E. McKenzie.)

A. Yes, sir.

The Court: I have no further questions.

Cross Examination

Q. (By Mr. Bradley): Colonel McKenzie, you stated that the fence and gate were quite delapidated when you took command at the Stead Air Force Base?

A. No, sir, I did not say that. I feel it serves the purpose.

Q. Are you familiar with the current boundaries of Stead Air Force Base?

A. I have in my installation officer's files surveys of the [60] Base, aerial photos.

Q. I show you, Col. McKenzie, a map entitled "Real Estate Reno Air Base and Bombing Range Military Reservation." By looking at this, can you determine the present boundaries of Stead Air Force Base? A. No, sir, I could not.

Q. This fence, Col. McKenzie, that you assume is on the property line, are you aware of how much government property is immediately north of the fence?

A. Approximately two hundred feet by something like two miles.

Q. Approximately two hundred feet in depth by approximately two miles in length, is that correct?

A. Yes.

Q. Then beyond two hundred feet, that is on the south half of Section 5, that would be the east half of the west half of Section 5, there is a two

(Testimony of B. E. McKenzie.)

hundred foot strip there in depth with government fence, is that correct? A. Yes, sir.

Q. Then from the northerly end of that two hundred foot strip, approximately how far is it until you again reach any more government owned property, part of the Air Force Base?

A. That is a matter of approximately another mile and a half.

Q. Are you familiar with the ownership of the property in Section 5 north of the two hundred foot strip, Colonel?

A. I believe that is Mr. John Cavanaugh. [61]

Q. Are you familiar with the ownership of Section 5 in its entirety?

A. I couldn't tell you what Section 5 comprises without looking at the chart now.

Q. May I ask you this, Colonel, when you came into command at Stead Air Force Base, was the old Purdy highway visible to you in Section 5?

A. Parts of it. Parts of it are washed out. From the map I am not sure that is in Section 5.

Q. In the area that we have included in this map, are you familiar with the property in question, so that the map has any meaning to you, Colonel? A. Yes, I think so.

Q. Colonel, I show you on this map Section 5 and the map designates the old Purdy highway, is that correct?

A. I do not think that is correct, sir.

Q. In what respect is it not correct?

A. I am not positive, but I think that the old

(Testimony of B. E. McKenzie.)

Purdy highway, if it exists at all, that this fence does not go across this fence corner. However, by looking at the photo, I couldn't say.

Q. As far as the old Purdy highway enters into Section 5, Mr. Cavanaugh's ownership is in the east half of the west half of Section 5?

A. As far as I know this is correct, except for the actual [62] location of that point crossing this line, I am not sure.

Q. Are you familiar with the dirt road that goes into what is designated present gate on the map? A. Yes, sir.

Q. Is that road plainly visible on the ground?

A. Yes, sir.

Q. Was that plainly visible at the time you took command at Stead Air Force Base in 1955?

A. I do not remember.

Q. Colonel, do you have anything to do with the real estate division of the Farmers Home Administration of the United States government?

A. No.

Q. I show you a deed from the United States of America by the Federal Farm Mortgage Corporation to George William Burke.

Mr. Bradley: Your Honor, at this time I would like to offer this deed into evidence. It is a certified copy of the deed.

The Court: While we are waiting, counsel, I assume the white copy of the map that you presented to the witness is identical with the black copy. The map indicates that as to Section 5, the government

(Testimony of B. E. McKenzie.)

owns all of the area in that section enclosed within the heavy broken line. Does your map have that type of line upon it? (Conference at the bench between court and counsel.) [63] Very well, counsel has corrected the Court. The map we are referring to indicates that all of Section 6 belongs to John Cavanaugh, with the exception of the west one-half of the west half of Section 5, together with a sort of corridor, which would be at the south end of the southeast quarter of the southwest quarter of Section 5, and I assume that is the parcel which counsel alludes to as being two hundred feet in width.

A. That is correct, your Honor.

Mr. Bradley: If you have any questions, your Honor, that this two hundred foot strip does not actually extend to the east; in other words, this line, heavy line, should continue.

The Court: The corridor on the south end of Section 5, clear across:

(Off the record discussion.)

Mr. Bradley: I will withdraw the offer of that deed at this time. I will wait until we go into my case in chief.

Q. Colonel, what maintenance have you employed on this fence during the time you have been here?

A. The only maintenance that I have been concerned with personally was to repair the fence after Mr. Cavanaugh or his workmen went through it.

Q. You have not ordered any other construc-

(Testimony of B. E. McKenzie.)

tion on the fence at all during the time you have been there? [64]

A. We did replace government property signs. Other than that, I am not aware of any construction.

Q. Have you replaced any fence posts?

A. That, sir, is the responsibility of my area installation engineer. I wouldn't know.

Q. You don't know whether any fence posts were replaced, any wires tightened?

A. I don't know.

Q. Colonel, do you know who installed that fence? A. No, I do not.

Q. You have no knowledge of that at all, is that correct? A. No.

Q. When did you first put a padlock on the fence, Colonel?

A. When the existing padlock was broken or removed in August of 1955.

Q. There was a padlock on there all the time prior to that time?

A. To the best of my knowledge.

Q. But you don't know whether there was or not?

A. I do not know. To the best of my knowledge there was. It had been broken. It was hanging there.

Q. Do you know whether or not, of your own personal knowledge, there had been a padlock on that gate all the time from the time you took command down to August 1, 1955?

(Testimony of B. E. McKenzie.)

A. Not to my personal knowledge.

Q. Do you know who owned that padlock that was on that gate? [65] A. No.

Q. Was it an United States government padlock? A. I do not know.

Q. You don't know who had the key? You did not?

A. No. I assume my installation engineer had that.

Q. But you did not? A. I did not.

Q. Colonel, did you ever issue orders to any of your men to restrict Mr. Cavanaugh, or his employees, from crossing that two hundred foot strip?

A. Yes; in my absence, my deputy did that.

Q. On your order, sir?

A. No, I wasn't here. It was in my absence; however, I assume the responsibility. At a later date, after giving Mr. Cavanaugh permission to winterize for two weeks and subsequent to that date about six weeks, I directed the gate to be locked again. At the time I found Mr. Cavanaugh or his employees had poured two additional foundations.

Q. Now this padlock, from the one you had up to that time, is evidently different lock on the gate. Did you put on a new lock?

A. I put on a padlock. I don't know whether it is the same one.

Q. And you ordered that gate to be padlocked at that time? A. That is correct.

Q. Did you issue orders to any of your men to

(Testimony of B. E. McKenzie.)

order any of Mr. Cavanaugh's men off this property? [66] A. No, I did not.

Q. But there were orders came out that you assume responsibility for, keeping Mr. Cavanaugh from crossing that two hundred foot strip, is that correct?

A. No. I wrote a letter to Mr. Cavanaugh, explaining that the temporary permission to enter was rescinded, due to the fact that he had performed construction in addition to that for which the temporary permission was given.

Q. Colonel, were you particularly concerned about the construction or his right of ingress and egress?

A. I was concerned only about his right-of-way or right of ingress or egress.

Q. What does that have to do with this construction, sir?

A. In this manner—I don't have the authority to grant a permanent right of entry. If Mr. Cavanaugh were allowed, by my permission, to complete his development of 168 living units, I would, by implication, have given him a permanent right of ingress and egress. For that reason I advised Mr. Cavanaugh of the proper manner in which to obtain a right of entry.

Q. Colonel, do you generally have authority to issue a right of entry?

A. A temporary right.

Q. Do you have authority to take away a right of entrance which is in existence? A. No.

(Testimony of B. E. McKenzie.)

Q. Your answer to that question is no?

A. That is correct.

Mr. Bradley: That is all I have.

Redirect Examination

Q. (By Mr. Alswede): Colonel McKenzie, did Mr. Cavanaugh ever apply to you for a permanent right-of-way or easement be granted him across this property in question?

A. Yes, in August of last year, after he had moved the buildings, at which time I explained to Mr. Cavanaugh it was beyond my authority to grant, and also explained to him how he should apply for an order and I forwarded his application to headquarters in Washington.

Q. He did apply for an easement, then, across this two hundred foot strip at the location of the gate which is now in question? A. Yes, sir.

Mr. Alswade: No further questions, your Honor.

Recross Examination

Q. (By Mr. Bradley): Colonel, this right-of-way that Mr. Cavanaugh applied for, did Mr. Cavanaugh ever accept that? A. No, sir.

Mr. Bradley: That's all.

The Court: What was that question?

Mr. Bradey: I asked him if he knew whether or not Mr. Cavanaugh accepted the right-of-way that was proffered by the Air Force. The answer was no. [68]

The Court: I didn't know there was any offer to him other than a temporary right of entry.

(Testimony of B. E. McKenzie.)

Mr. Bradley: I believe the Colonel stated, your Honor, that a temporary right-of-way was proffered by the Air Force.

A. Mr. Cavanaugh applied for housing, which we forwarded to Washington, United States Air Force. The decision has to be made by the Department of Air Force. They decided to grant Mr. Cavanaugh a right of entry, with certain reservation provisions, if he would agree to that. Direction was sent to the corps of engineers to negotiate with Mr. Cavanaugh and the last time I inquired from the corps of engineers, possibly a week ago, he had not accepted the permanent right of entry.

The Court: Do you recall, Colonel, briefly the reservations that were attached to that offer?

A. One, your Honor, was a fifty dollar fee, I believe, for the construction of the gate. Another was a provision wherein if, in the future, it was determined by the Secretary of the Air Force, or words to this effect, that the housing development were sub-standard, the Secretary of the Air Force could withdraw the license.

The Court: We are all agreed on the proposition that this building division of Mr. Cavanaugh was ultimately designed to house personnel of your Air Base?

A. I do not know, sir, what Mr. Cavanaugh intended. [69]

Q. Were there any other restrictions?

A. Not that I recall, your Honor. You understand that this document was not given to me to

(Testimony of B. E. McKenzie.)

offer to Mr. Cavanaugh. It was given to the corps of engineers.

The Court: Yes. I was just asking for your best knowledge of it. I have no further questions.

Redirect Examination

Q. (By Mr. Alswede): I would like to clarify one point, your Honor. This easement that you speak of which was offered to Mr. Cavanaugh, was that not in effect a five-year revocable license, rather than an easement?

A. I believe that is correct.

Q. Then it was not a permanent easement that was offered, but merely a five-year revocable license?

A. That is possible, to the best of my knowledge.

Q. And he did not accept the five-year license?

A. That is correct.

Mr. Alswede: That is all.

Mr. Bradley: I have no further questions.

The Court: There is the technical proposition—and I do not indicate it is not important—of maintaining the integrity of the government's title and not permitting adverse uses to be acquired against it, such as easement, is that the only problem involved here? There seems to me to be a shadow [70] lingering in the background as to this development of Mr. Cavanaugh's.

A. Well, that is not a concern of mine, sir. There is one question bearing in the problem, and

(Testimony of B. E. McKenzie.)

that is the granting of a permanent easement by implication, which I could not do.

The Court: I can well understand it is part of your official duties, as I say, to protect the integrity of the government's title, and that absolutely is what you are doing. A. That is right.

The Court: Sometimes there is a little background information to these things and that is why I asked that question.

A. My personal opinion on Mr. Cavanaugh's development would have no bearing on my authority.

The Court: Yes, I understand. Is there anything further of this witness?

Recross Examination

Q. (By Mr. Bradley): I believe the Colonel stated it was beyond his authority to grant a permanent easement, and you also testified it was beyond your authority to take away an existing easement.

Mr. Alswede: That is not a question.

The Court: There was some question asked, but perhaps the Colonel did not quite understand. If there was a permanent easement replaced by law, I presume [71] the Colonel would recognize it.

Q. I meant, he would not have authority to take it way.

A. Are you referring to my temporary permission I gave Mr. Cavanaugh for two weeks?

Q. No. Were there a permanent easement in

(Testimony of B. E. McKenzie.)

existence in this area, would it be within your authority to take that away? A. No, sir.

(Witness excused.) [72]

[Endorsed]: Filed April 3, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that John Cavanaugh, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order granting defendant's Motion to Dismiss the above entitled action entered in this action on March 27, 1957.

Dated this 29th day of March, 1957.

GRUBIC, DRENDEL & BRADLEY,

/s/ By WILLIAM O. BRADLEY,

Attorneys for Appellant. [74]

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, An Order granting defendant's motion to dismiss the above entitled action was entered in the above entitled action on the 27th day of March, 1957, in the United States District Court for the District of Nevada; and,

Whereas, the Appellant, John Cavanaugh, feel-

ing aggrieved thereby, has prosecuted his appeal to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, the Hartford Accident and Indemnity Company, a Connecticut corporation authorized to transact a surety business in the State of Nevada, in consideration of the premises, hereby undertakes in the sum of Two Hundred Fifty Dollars ($250.00) that if the Order so appealed from is affirmed, or the appeal is dismissed, the Appellant, John Cavanaugh, shall pay to the defendant above named all costs awarded against him on said appeal, or such costs as the Appellate Court may award if the Order is modified.

Dated this 29th day of March, 1957.

[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY,
/s/ By JAMES E. SLINGERLAND,
Attorney-in-Fact. [75]

Notary Certification Attached. [76]

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby

certify that the accompanying documents, listed in the attached index, are the originals filed in this court, or true and correct copies of docket entries of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 18th day of April, 1957.

[Seal] /s/ OLIVER F. PRATT,
Clerk, U. S. District Court. [77]

[Title of District Court and Cause.]

ORDER

This Cause came on to be heard on defendant's Motion to Dismiss the action on the ground that the Court is without jurisdiction to entertain this action because it is in substance and effect against the United States of America, the United States not having consented to be sued or not having waived its immunity from suit; and the Court having heard the argument of counsel and it appearing to the Court that the Court is without jurisdiction,

It Is Ordered that this Action be, and the same is hereby, dismissed.

Dated this 25th day of March, 1957.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed July 31, 1957.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Notice Is Hereby Given that John Cavanaugh, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order granting defendant's Motion to Dismiss the above entitled action filed in this action on July 31, 1957.

Dated this 1st day of August, 1957.

GRUBIC, DRENDEL & BRADLEY,
/s/ By WILLIAM O. BRADLEY,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 2, 1957.

[Endorsed]: No. 15530. United States Court of Appeals for the Ninth Circuit. John Cavanaugh, Appellant, vs. B. E. McKenzie, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: April 19, 1957.

Docketed: April 26, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15530

JOHN CAVANAUGH, Appellant,

vs.

B. E. McKENZIE, Appellee.

APPELLANT'S STATEMENT OF POINTS

Appellant intends to rely upon the following points:

1. The Court erred in granting Appellee's Motion to Dismiss on the grounds that the suit was in effect a suit against the sovereign to which the sovereign had not consented, because,

(a) The action of Appellee, B. E. McKenzie, in destroying Appellant's right-of-way to his property and depriving him of the use of his property constituted a deprivation of Appellant's property by the Appellee without due process of law contrary to the Fifth Amendment of the Constitution of the United States of America, and is therefore not the action of the sovereign but the action of Appellee, B. E. McKenzie, and therefore the Motion to Dismiss should be denied.

United States vs. Lee, 106 U.S. 196, 27 L. Ed. 171, and cases cited therein

Land vs. Dollar, 1949, 330 U.S. 731, 67 S.

Ct. 1009, 91 L. Ed. 1209, and cases cited therein.

Larson vs. Domestic and Foreign Commerce Corp., 337 U.S. 682, 93 Law Ed. 1628, and cases cited therein.

Dated this 26th day of April, 1957.

GRUBIC, DRENDEL & BRADLEY,
/s/ By WILLIAM O. BRADLEY,
Attorneys for Appellant.

Service of Copy Acknowledged.

[Endorsed]: Filed May 1, 1957. Paul P. O'Brien, Clerk.